CHANG AH MAY

v.

FRANCIS TEH THIAN SAR

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24(31)-1696 OF 1987]
15 NOVEMBER 1989

FAMILY LAW: *Custody - Welfare of the child - Paramount consideration - Wishes of the child - Discretion of the* Court *- Guardianship of Infants Act 1961 and Law Reform (Marriage and Divorce) Act 1976.*

On 4 July 1987, the plaintiff C was awarded custody of the infant, unopposed by the defendant F. F was granted weekly access on Sundays for four hours. On 7 November 1987, F applied for a review of the access order and he was granted more liberal access. There were numerous allegations and counter-allegations caused by both parties.

C subsequently obtained a position as a staff nurse in Singapore and began to make arrangements to move the infant to C's parents house in Johore Bahru. On 12 July 1989, F filed the present application seeking to revoke the earlier custody order.

Held:

[1] In custody cases, under the relevant statutes, that is the Guardianship of Infants Act 1961 (the 1961 Act) and the Law Reform (Marriage & Divorce) Act 1976 (the 1976 Act), it is of paramount importance that the Court or a Judge must have regard to the welfare of the infant.

[2] However, s. 88(3) of the 1976 Act states that the welfare of the minor is to be the paramount consideration; it does not declare that the welfare of the minor is to be the sole consideration.

[3] It has been held by the English Courts (in relation to the equivalent s. 88(3)) that the section necessarily contemplates the existence of other conditions and amongst them the wishes of an unimpeachable parent undoubtedly stand first unless the adoption of such a course would be disadvantageous to the child.

[4] Taking into account the affidavit evidence of both parties it is clear that firstly, the situation of the mother is more orderly than the father's, secondly that the maternal grandparents are fully capable of taking proper care of the infant when the mother goes to work in Singapore and thirdly that the mother will devote most of her free time to look after the welfare of the infant.

[5] It has been judicially accepted that if a child is old enough to express its own wishes, the Court will consider them, not so that it can give effect to those wishes but to be the better Judge of what is best for the child's welfare. It must also be remembered that if the child's own wishes are so contrary to its long-term interests, the Court may feel justified in disregarding them altogether.

[6] In the present case, the infant is only 10 years and she is probably not old enough to realise what is best for her own welfare much less for her long-term interests. Her wish not to stay with her mother was simply because the mother often left her in other people's house. Such a state of affairs will no longer prevail once the infant stays with her blood relatives.

[7] As to the question of whether it is in the infant's interest to remove her from her present environment (the paternal grandparents) the Court held that such change was necessary for the infant's happiness and her welfare because the removal of the infant from a miserable living environment to a more congenial environment would be good for the infant.

[Applicant father's application dismissed.]

Cases referred to:
Loh Kon Fah v. Lee Moy Lan [1976] 2 MLJ 199
Teh Eng Kim v. Yew Pong Siong [1977] 1 MLJ 234
J v. C [1970] AC 668

Legislation referred to:
Guardianship of Infants Act 1961, s. 11
Law Reform (Marriage and Divorce) Act 1976, s. 88

For the plaintiff - Vignesvary Alahakone; M/s. Jayshree Balan
For the defendant - Davidason; M/s. Syarikat Davidason

JUDGMENT

Lim Beng Choon J:

In this application the father of the female infant is asking the Court to revoke an earlier order granting custody of the infant to the mother and instead to award the custody of the infant to him.

The events leading to the present application are briefly these. An application for the custody of the female infant was made by the mother of the infant on 16 May 1987. The infant is now 10 years 6 months old; she was born on 13 April 1979. The marriage of the parents took place on 7 December 1979 and they lived in Shah Alam, Selangor. Apparently the marriage was not a happy one and the father left the mother and the infant some time in 1986. The mother alleged (and it is not seriously disputed by the father) that her husband had deserted her because of his involvement with another woman. The mother thereafter presented a petition for divorce on 7 December 1987. A *decree nisi* was granted by the Court on 12 April 1989.

When the application of the mother for custody of the infant came on for hearing on 13 June 1987, the father did not oppose the application. Consequently the Court made an order allowing the custody, care and control of the infant to be committed to the mother (hereinafter referred to as 'the custody order'). Interim access to the infant between the hours of 2 p.m. to 6 p.m. on every Sunday was awarded to the father by the Court on 4 July 1987.

On 7 November 1987, the father made an application to review the access order. As a result of his application he was allowed more liberal access to the infant between the hours of 11 a.m. to 7 p.m. on the first and second Sundays of every month and the first half of every school holidays. In addition he was allowed access on Christmas day and Hari Raya Puasa holiday between the hours of 6 p.m. to 9 p.m.

It is also convenient to mention here that on 23 July 1987, the mother applied to this Court to commit the father to prison for his contempt of Court as it was alleged that he had breached the custody order by deliberately removing the infant from the mother's custody. The father likewise made an application for a committal order against the mother on 1 March 1989 alleging

that she had deliberately denied him access to the infant. In their affidavits in support of their respective applications, allegations of misconduct and bad faith on the part of the opposing party were unreservedly raised by the applicants. Counter allegations of like nature were likewise asserted in the affidavits in reply made by the respective parties in opposition. I do not propose to set out at any length the contents of the said affidavits. I need only to mention that I have ignored these allegations and counter allegations insofar as they are, in my view, irrelevant to the custody issue raised by the present litigation. I must also bear in mind that the judicial skirmishes of the parents may well be motivated not so much by the feeling of love for the infant but rather by the feeling of hostility between the parents. I must not therefore allow these skirmishes to influence me in my decision of this case.

On 15 December 1988, the mother proposed to resign from her post as a staff nurse with the University Hospital Petaling Jaya where she was paid a monthly salary of RM1,195 to take up an appointment as a staff nurse with the National University Hospital, Singapore where she would be paid a monthly salary of RM1,900 excluding night duty and ward allowances. She therefore took steps to arrange for the infant's transfer to a school in Johor Bahru and to apply to the Court for permission to move the infant to the maternal grandparents' house in Johor Bahru. The father came to know about her plan and he in turn filed the present application on 12 July 1986. In his affidavit in support (encl. 43) he claimed that the mother deliberately planned the move in order to deny him any access to the infant. In his affidavit he also said that when the infant was told on 3 July 1989 about her moving to Johor Bahru to stay with her maternal grandparents, the said infant, on her own, went to the police station at s. 6 Shah Alam where she lodged a police report stating that she was not going back to the mother and that she was prepared to stay with the father. The mother in her affidavit in reply (encl. 47) retorted by saying that the reason for her taking up the appointment in Singapore was simply because of the better pay offered by the National University Hospital Singapore. The better pay would go a long way to help her to provide for her daughter's present and future needs. She also accused the father of deliberately removing the infant from her home and taking her to the police station in Shah Alam to lodge the report. The father denied all these allegations.

Turning to the law, the matters relating to guardianship and custody of an infant are regulated by two statutes. We have, firstly, the Guardianship of Infants Act No. 13 of 1961. It is provided under s. 5 thereof that the father of an infant shall be the guardian of the infant's person and property but that right is not absolute for the said s. 5 is made subject to s. 10 of the Act which declares that the Court or a Judge may at any time remove from his guardianship of any guardian, whether a parent or otherwise and may approve from time to time another person to be the guardian in his place. In exercising the powers conferred by the Act, however, the Court or a Judge is enjoined to have regards to the matters specified in s. 11 of the Act which reads:

> 11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

It has often been stated in many judicial decisions that in considering custody issue, it is of paramount importance that the Court or a Judge must have regard to the welfare of the infant and the welfare of the infant must prevail over parental claim - see *Loh Kon Fah v. Lee Moy Lan* [1976] 2 MLJ 199 and *Teh Eng Kim v. Yew Pong Siong* [1977] 1 MLJ 234.

The second statute that contains provisions for the custody and protection of children is the Law Reform (Marriage & Divorce) Act No. 164 of 1976. The provisions in the 1976 Act appear to be in addition or a supplement to the existing provisions under the Guardianship of Infants Act 1961. Section 88(1) of the 1976 Act provides that the Court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relatives of the child or any association the objects of which include child welfare or to any other suitable person. In deciding in whose custody a child should be placed subsection (2) of that section says that the paramount consideration shall be the welfare of the child and subject to this the Court shall have regard to the wishes of the parents and to the wishes of the child, where he or she is of an age to express an independent opinion. It is also stated in subsection (3) thereof that it shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes in custody.

The provisions of subsection (3) of s. 88 of the 1976 Act are in line with the provisions in s. 1 of the English Guardianship of Infants Act 1925 (now repealed and replaced by the Guardianship of Minors Act 1971). Under the English provisions the Court, in determining *inter alia* the question as to the legal custody or upbringing of a minor:

> shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any point of view the claim of the father in respect of such legal custody or upbringing is superior to that of the mother or the claim of the mother is superior to that of the father.

It is to be noted that the section states the welfare of the minor is to be the paramount consideration but it does not declare that the welfare of the minor is to be the sole consideration. It has therefore been held by the English Courts that the section necessarily contemplates the existence of other conditions and amongst them the wishes of an unimpeachable parent undoubtedly stand first unless the adoption of such a course would be disadvantageous to the child. This proposition is expressed by Lord MacDermott in *J & C* [1970] AC 668 at 715 in this way:

> While there is no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering of the total welfare of the child in a special way, and must remain qualified and not absolute for the purposes of the investigation, the broad nature of which is still as described in the fourth of the principles enunciated by FitzGibbon LJ in *In re O'Hara* [1900] 2 IR 232,

It now remains for me to apply the principle enunciated in the judicial decisions mentioned above to the facts in the case as elicited from the affidavits filed by the respective parties. That the father or the mother on his or her own part is financially sound to support the infant, I have no doubt. The father, however, asserted in his affidavit of 3 May 1987 (encl. 12) that as his daughter's welfare ought to be the paramount consideration, she should be left with his own parents to be cared for by them. This statement of his is a clear indication that should custody be awarded to the father, he would leave the infant under the care of his own parents. This proposition finds support from another assertion of the father when he said that his parents' home was a suitable place for the infant to reside in. There is no

doubt in my mind that the father cannot spend much time with the infant as he has to look after his business. Now the paternal grandmother of the infant is senile and the paternal grandfather is 68 years old. That being the case, it is highly improbable that they would be able to take proper care of the infant. Besides the paternal grandparents' house in which the infant is supposed to reside is currently occupied by some twelve adults who because of old age, physical impairment or preoccupation with their respective trades, as the case may be, are incapable of bestowing upon the infant the tender care and love which is very essential during the formative years of early adolescence. It is true that the father had said in his affidavit that he intended to marry the other woman, with whom he was involved in the near future and that this other woman, with whom the infant was very familiar, would take proper care of the infant. I am not impressed with these assertions of the father for apart from the uncertainty as to when this marriage will take place, I have doubts that a healthy relationship would be developed between the infant and this other woman considering that she was partly to be blamed for the breaking up of the marriage of the parties in this matrimonial action.

The mother, on the other hand, is living in a family situation which, to my mind, is more orderly. The household of her parents comprised of her mother and father and a sister who has three children, two of whom are almost of the same age as the infant. The maternal grandparents and her sister, according to the mother, are fully capable of taking proper care of the infant when the mother goes to work in the hospital in Singapore. I accept her assertion since there is no suggestion by anyone that this assertion is not true. I have also no doubt that the mother will devote most if not all her free time to look after the welfare of the infant. This proposition is borne out by the fact that the sole purpose of the mother taking a job in the hospital in Singapore was to better her financial position to enable her to cater for the infant's future educational needs. Apart from arranging for the proper care of the infant by her parents and sister, she has also ensured that the infant will be joining a good school to which the cousins of the infant are attending. All these vouch for her devotion to her daughter. In any event the complaints of the father are mainly directed to the fact that when the mother was working in the hospital in Petaling Jaya the infant was often left under the care of a baby sitter who did not give the infant the proper care. These complaints can no longer be sustained when the infant is moved to Johor Bahru and put under the care of her maternal grandparents and auntie. Indeed I have no doubt that the infant will be happier as she will be staying in more congenial surroundings.

Another important factor which I must take into consideration is the wishes of the infant. I have seen and spoken to the infant. She told me that she would not like to stay with her mother simply because the mother often left her in other people's house. She also said that she liked her father. Now it has been judicially accepted that if a child is old enough to express its own wishes, the Court will consider them, not so that it can give effect to those wishes but to be the better to Judge what is best for the child's welfare. It must also be remembered that if the child's own wishes are so contrary to its long-term interests, the Court may feel justified in disregarding them altogether. In the present case the infant is only 10 years old. I do not think she is old enough to realise what is best for her own welfare much less for her long-term interests. In any case the infant has not said that she dislikes let alone hates her mother. She preferred to stay with the father simply because when the mother went to work in the hospital in Petaling Jaya she would be left at the baby sitter's house under the care of the baby sitter of whom apparently she was not very fond. Her reluctance to stay with her mother sprang from her feeling of loneliness and her hatred of being left under the care of strangers. Such a state of affairs will no longer prevail once the infant is moved to stay with her blood relatives namely her maternal grandparents and auntie in Johor

Bahru. In saying this, I have not ignored the allegation made by the father about the infant running to the police station to lodge a report. I think it is more likely than not that the incident has been exaggerated by the father. It is incredible that an infant of her age would be brave enough to walk into a police station to lodge a report. The mother's version about the father's taking the infant to the police station and urging her to lodge a report is more acceptable.

One final point to consider. The infant has been residing with the paternal grandparents for some three months. Since the lodging of the police report incident the father has taken her to the paternal grandparents' house. I must therefore ask myself whether it is in the infant's interest to remove her from her present environment. In considering this point there is a commendable advice given by Lord MacDermott in *J v. C* [1970] AC 668 at 715:

> Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing *dicta* to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case.

In the present case I have considered with great care the effect of a change of custody and I am very sure that such change is necessary for the infant's happiness and her welfare simply because the removal of the infant from a miserable living environment to a more congenial environment will surely be good for the infant. Furthermore unlike the *J v. C* case where the infant had lived for over eight years with his foster parents who had a stable home life, the infant in the present case had been staying with her mother at all material times until the father lured the infant away in July 1989 and put her in a household where she will not be able to enjoy a stable home life. Taking all the circumstances into consideration I have to doubt that the infant will be better off to be under the care and control of her mother.

The application of the father for custody, care and control of the infant is therefore dismissed. The custody, care and control of the infant will remain with the mother. Except as provided in this judgment, the statutory right of the father as provided in s. 5 of the Guardianship of Infants Act No. 13 of 1961 as the legal guardian of the infant's person and property shall remain unimpaired. The father's right of access to the infant as granted by the Court will remain the same. Lastly I also allow the mother's application to remove the infant to the house of the maternal grandparents in Johor Bahru where the infant will reside. There is no order as to costs.

Finally I order that there be general liberty to apply.

Also found at [1991] 1 CLJ 309